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Supreme Court of the United States

October Term, 1951

No. 159

THE FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, et al . . . . Appellants,

vs—

ATLANTIC COAST LINE RAILROAD COMPANY . . . . . Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

LEWIS W. PETTEWAY,
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OPINION OF THE COURT BELOW

The judgment of the District Court for the Northern District of Florida, Tallahassee Division, which is the subject matter of this appeal, was unreported at the time appellants' jurisdictional statement was filed. A copy of the opinion, findings of fact, conclusions of law, and judgment was attached to said jurisdictional statement as Appendix A. The opinion has now been reported and will be found in *96 F. Supp. 583, Advance Sheet No. 4,* dated May 21, 1951.

JURISDICTION

The judgment of the District Court was filed with the Clerk of said Court and entered on March 26, 1951. The petition for appeal herein was presented to the members of said District Court while they were in New Orleans, Louisiana on May 25, 1951, and the order allowing the appeal was signed by the members of said Court on the same day and marked "filed before me this 25th day of May, 1951. Dozier DeVane, District Judge." All members of the Three-Judge District Court, aforesaid, as well as all Federal Judges from the State of Florida were, on May 25, 1951, attending a conference of Federal Judges in New Orleans, Louisiana, which explains the reason why the order allowing the appeal was filed with the Court itself on May 25, 1951, rather than with the Clerk. Only in this way could the appeal be perfected within the statutory period since it was humanly impossible to return the order allowing the appeal to the Clerk's Office in Tallahassee, Florida and file the same there on May 25, 1951, the last day on which the appeal could be taken. The order allowing the appeal was brought to Tallahassee by District Judge DeVane and delivered to the Clerk on Monday, May 28, 1951. This appeal was perfected within the statutory period.

APPELLEE'S MOTION TO DISMISS OR AFFIRM

The appellee herein has filed a rather comprehensive reply to appellants' jurisdictional statement and has incorporated therein its motion to dismiss this appeal or affirm the judgment of the lower court. The motion to dismiss is based on appellee's contention that it never had an adequate remedy in the State Courts of Florida and that if it did at

one time have such a remedy, it has since been lost through no fault of the appellee. Such a contention is neither sound in law nor accurate from a factual standpoint.

The order of the Florida Railroad and Public Utilities Commission which was under attack before the lower court was entered by said State Commission on October 19, 1950. The injunction proceedings whereby appellee sought to have said order vacated was instituted in the lower court on December 27, 1950, the *sixty-first* day after the entry of the Commission's order. Orders of the Florida Commission may be reviewed by the Supreme Court of Florida if such proceedings for review are commenced within *sixty* days from the entry of the order in question. In this case, the appellee waited until the time for seeking a review in the State Court had transpired before asking injunctive relief in the Federal Court. This was of appellee's own choosing and it cannot now complain if it has lost its rights to have the Commission's order reviewed in the State Court.

Appellee has set out in its reply to appellants' jurisdictional statement, and as a basis for its motion to dismiss this appeal, that no remedy by appeal from an order of the Florida Commission is afforded by the Laws of Florida, and that recent attempts by the appellee to take advantage of the right of appeal to the Supreme Court of Florida from similar orders have met with disaster. Appellee cited the following cases in support of said statement: *Atlantic Coast Line Railroad Co. vs. King, 47 So.2d, 514,* and *Atlantic Coast Line Railroad Co. vs. U. S. Sugar Corporation, et al., 47 So.2d, 513.* Reference to these two cases will disclose that the appellee herein did attempt to take an appeal to the Supreme Court of Florida from two separate orders entered

by the Florida Railroad and Public Utilities Commission. These cases do not disclose, however, that the appellee met with disaster. As a matter of fact, while the Supreme Court of Florida in each case held that *certiorari* and not *appeal* was the proper method of review, the Court treated each such appeal as a certiorari and required that each cause should proceed in accordance with rules governing certiorari proceedings. The Sugar Corporation case has not yet reached final decision, however, the other case has been finally decided by the Supreme Court of Florida and is reported in *49 So.2d, 89.* A study of the Court's opinion in this case, which was handed down on November 28, 1950, just prior to the time injunction proceedings herein were instituted in the lower court, will disclose that it was decided by the Supreme Court of Florida strictly on the *facts* as disclosed by the evidence presented to the Florida Commission. This case involved questions somewhat similar to those involved in the present case and amply demonstrates that the Florida Supreme Court *will* set aside an order of the Florida Commission which is found to be contrary to the substantial weight of the evidence, or erroneous as a matter of law, which clearly meets the requirements of this Court's recent decision in the case of *Alabama Public Service Commission vs. Southern Railway Co.*, decided May 21, 1951, *(19 U.S.L. Week 4314).*

It has long been recognized that judicial review of orders of the Florida Railroad and Public Utilities Commission is an integral part of the regulatory process under the laws of Florida. The Supreme Court of Florida time and time again has held that it *will review* orders of the Commission and that such orders *will be set aside* where materially injurious to legal rights or privileges and which do not give

an appropriate consideration to relevant facts — *Florida Motor Lines vs. Railroad Commissioners, 129 So., 876.*

In a very recent case the Atlantic Coast Line Railroad Company, the appellee herein, applied to the Florida Commission for an order allowing it to close its station agency at Longwood, Florida for a short period during the Summer months of each year. After a public hearing the Florida Commission denied the application and the Atlantic Coast Line brought certiorari proceedings in the Supreme Court of Florida to have the Commission's order reviewed. In its decision in that case, *Atlantic Coast Line R.R. Co., v. King, et al. 51 So.2d, 723,* dated April 6, 1951, the Supreme Court of Florida said:

> "It is established law that this Court will not interfere with conclusions reached by the Railroad Commission as to factual matters, but in instances where the Railroad Commission fails or omits to correctly construe or interpret the legal effect of the testimony, when considered in its entirety, then this Court, on petition for certiorari, will give to such testimony the interpretation that should have been given by the Railroad Commission."

It seems abundantly clear to us that the laws of Florida adequately provide for judicial review of orders entered by the Florida Railroad and Public Utilities Commission.

In addition to the review of such regulatory orders through certiorari proceedings there is another method whereby one aggrieved by an order of the Florida Commission can protect his rights through judicial proceedings in the State Courts of Florida. We refer to the proceedings which were followed in the case of *State vs. Georgia So. and*

F. Railway Co., 190 So., 527. In this case the Georgia-Southern and Florida Railroad Co. applied to the Florida Commission for authority to substitute twi-weekly passenger train service over the Company's line from Valdosta, Georgia to Palatka, Florida, in lieu of the daily service then being furnished over said road. The Florida Commission denied the application and was immediately notified by the Railroad Company that the service would on a stated day be reduced to tri-weekly service notwithstanding the order of the Commission. The Commission then brought suit to enjoin the company from discontinuing the daily service over said line. This illustrates another method under Florida procedure whereby one may force a judicial determination of his rights which may have been adversely affected by a regulatory order of the Florida Commission.

Under Florida law adequate State Court review of the administrative order in question here, based upon predominately local factors, was available to appellee had it taken advantage of its opportunities within the time allowed by law so that intervention of the Federal Court was not necessary for the protection of appellee's Federal rights.

APPELLEE'S REQUEST FOR RETENTION OF JURISDICTION BY LOWER COURT PENDING REVIEW OF COMMISSION'S ORDER BY STATE COURT

The appellee has requested that if a reversal must result herein, as we submit it must under recent decisions of this Court, then such reversal should accord to the appellee the right to apply to the District Court for a temporary restraining order against the enforcement of the Florida Commission's order until such reasonable time as the appellee

might require to proceed in the State Courts. We submit that such a request should not be granted in view of the decision handed down by this Court on June 4, 1951 on the motion of Southern Railway in Case No. 395, *Alabama Public Service Commission vs. Southern Railway Company*, supra, for an order by this Court to require the District Court for the Middle Alabama District to retain jurisdiction pending resort by the Southern Railway to the State Courts for appropriate relief. In making said motion Southern Railway took the position that by resorting to the U. S. District Court instead of taking its appeal under the State Statute during the thirty-day period allowed for that purpose, it probably had lost its right to such appeal and might now find it too late for consideration to be given its case in the State Courts and that it ought not to be prejudiced by reason of the fact that it elected to resort to the Federal Court rather than the State Court. This argument which was advanced by Southern Railway in the Alabama Case is the same as that advanced by Atlantic Coast Line in the present case. However, this Court found no merit in the argument, the motion was denied and no provision was made in the Court's mandate for retention of jurisdiction by the District Court pending proceedings in the State Court.

On the basis of the Court's decision in the case of Southern Railway Company, supra, we submit that appellee's request herein for retention of jurisdiction by the District Court should be denied.

CONCLUSION

On June 4, 1951 this Court reversed the decisions of two other Three-Judge District Courts from Alabama on the basis of the decision in *Alabama Public Service Commission vs. Southern Railway Company,* supra. We refer to Case No. 483, *Alabama Public Service Commission vs. Atlantic Coast Line Railroad Co.,* and Case No. 660, *Alabama Public Service Commission vs. Louisville and Nashville Railroad Company.* These cases are as yet unreported.

On the basis of the recent decisions of this Court handed down on May 21, 1951 and on June 4, 1951, and which we have cited herein, we respectfully submit that appellee's motion to dismiss this appeal or affirm the judgment of the lower court ought to be denied and appellee should be left to pursue through the State Courts whatever rights it may have.

Respectfully submitted,

LEWIS W. PETTEWAY,

Counsel for Appellants.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each such party as required by the Rules of Practice.

Dated at Tallahassee, Florida, this....28th.....day of June, 1951.

LEWIS W. PETTEWAY, of Counsel.